TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 207.

ANNA E. MITCHELL, EXECUTRIX, AND BLEECKER W. MITCHELL, EDWIN C. STURGIS, AND SPOFFORD H. DAVIS, TESTAMENTARY EXECUTORS OF SAMUEL L. MITCHELL, DECEASED, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED OCTOBER 13, 1875.

SUPREME COURT OF THE UNITED STATES.

No. 207.

ANNA E. MITCHELL, EXECUTRIX, AND BLEECKER W. MITCHELL, EDWIN C. STURGIS, AND SPOFFORD H. DAVIS, TESTAMENTARY EXECUTORS OF SAMUEL L. MITCHELL, DECEASED, APPELLANT,

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1 United States Court of Claims, December term, 1868.

SAMUEL L. MITCHELL
vs.
THE UNITED STATES. } No. 4665.—Filed January 25, 1869.

To the honorable the judges of the Court of Claims:

Your petitioner, Samuel L. Mitchell, a citizen and resident of the State of New York, respectfully represents:

That he was, on the 14th day of September, A. D. 1863, the owner of the steamship called the Star of the South; that on said day the said vessel entered upon the service of the United States under and by virtue of a regularly-executed charter-party, signed by your petitioner and by Major Stewart Van Vleit, quartermaster United States Army, on behalf of the United States, a copy of which said charter-party is hereto attached, and made part hereof, marked "A." Your petitioner further represents that by the terms of said charter-party the United States agreed to pay petitioner, for each and every day said vessel might be employed in said service, the sum of four hundred and fifty dollars, which he alleges was but a reasonable compensation for the services of said vessel; that said vessel continued in said service, faithfully performing all the requirements of said charter-party, until the 30th day of November, 1863, when the said vessel was discharged from the obligations of said charter; that the period of service of the said vessel as aforesaid was seventy-seven days, making the total earnings of said vessel, in accordance with the terms of the said charter-party, the sum
2 of thirty-four thousand six hundred and fifty dollars; but instead of paying your petitioner according to a reasonable and just estimate of the value of said services, the United States arbitrarily, and to the great wrong and without the consent of your petitioner, reduced the payments of said vessel insomuch, that instead of paying your petitioner the amount above set forth, as the earnings of the said vessel under the said charter-party, they were paid by the United States only the sum of thirty-one thousand and fifty dollars, leaving the further sum due your petitioner, as he alleges, of three thousand six hundred dollars, which the said United States still withhold wrongfully from your petitioner, and for which amount he asks judgment of this honorable court.

Your petitioner further avers that he has at all times borne true allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to the rebellion against said Government; that he has made application to the proper department for payment of the claim herein stated, but without success.

Your petitioner, therefore, by reason of the premises, asks judgment for the whole amount herein claimed, to wit, three thousand six hundred ($3,600) dollars.

CHIPMAN, HOSMER & CO.,
Solicitors for Petitioner.

STATE OF NEW YORK,
City and County of New York, ss:

Personally came before me, a notary public in and for said county and State above mentioned, who, being duly sworn, says that he is the petitioner in the foregoing petition; that no assignment of the claim therein stated has been made, except as in said petition stated; that the amount claimed is due to the petitioner, after allowing all just offsets

and credits; and that the matters and things in said petition stated are true.

SAM'L L. MITCHELL.

3 Subscribed and sworn to before me this 29th day of December, A. D. 1868.

[L. S.] EDW. ROWELL,
Notary Public.

EXHIBIT A.

This charter-party of affreightment, made this fourteenth day of September, in the year one thousand eight hundred and sixty-three, between Samuel L. Mitchill, owner of the steamer or vessel called the Star of the South, of New York, of the burthen of 960 registered tons, or thereabouts, at present lying in the harbor of New York, and commanded by Capt. M. S. Woodhull, of the first part, and Maj. Stewart Van Vleit, quartermaster United States Army, for the United States, of the second part, witnesseth, that the said party of the first part does and doth hereby grant and to freight let, and the said party of the second part does and doth hereby to freight take, the said steamer Star of the South, to load at New York, or elsewhere, and proceed on the voyage hereinafter mentioned. (Always reserving sufficient room for the stowage of the vessel's cables and materials, and accommodation of the officers and crew, and, if a steam-vessel, for necessary supply of coal.) And thereupon the party of the first part, and his heirs, executors, administrators, and assigns, doth hereby covenant, grant, and agree, to and with the said party of the second part, that the said vessel now is, and shall be, kept and maintained, during the whole of the voyage mentioned in this contract, tight, staunch, strong, and well and sufficiently manned, victualled, tackled, apparelled, and ballasted, and furnished in every respect fit for merchants' service, at the cost and charge of her owners. (The time lost in consequence of any deficiency in these respects not to be paid for by the United States.) And shall, on the 14th day of September, 1863, be ready to receive on board, whenever tendered alongside by the quartermaster United States Army, his factors or assigns, such troops, men, animals, and supplies, or cargo, as they shall order and direct, and the said vessel can conveniently stow and carry. And when laden shall proceed, with the first good opportunity, and without delay, from the port of New York, or elsewhere, and proceed direct to such ports and places as ordered by the quartermaster United States Army, and deliver cargo to the quartermaster or duly-authorized agent of the Quartermaster's Department. All pilotage and port charges will be paid by the United States after leaving the port of New York. All cargo to be received and delivered within reach of the said vessel's tackles. The said vessel shall deliver her cargo in good order and condition, (the dangers of the seas, fire, and navigation, and the restraints of princes and rulers being always excepted.) The war risk to be borne by the United States. The marine risk to be borne by the owners. For a voyage to New Orleans and return.

In consideration whereof the said party of the second part does agree to employ the said vessel on the voyage or voyages aforesaid; and that, as a freight or hire of the said vessel during the term of this contract, he will pay, or cause to be paid, the full and just sum of four hundred and fifty dollars per day for each and every day said vessel may be employed, and will furnish all fuel necessary for the navigation of the said vessel, if a steamer, until the said vessel is returned to the said party of the first part in New York, in the same order as when received, or-

dinary wear and tear, damage by the elements, collision at sea and in port, bursting of boilers, and breakage of machinery excepted. To become due, owing, and payable in the manner and form following, that is to say, payable to the order of Samuel L. Mitchill, at the quartermaster's office of the United States, at New York City, monthly, upon pre-
4 senting certificates of the duly-authorized agent of the Quartermaster's Department that the said vessel has faithfully performed her part of this contract.

The said vessel is valued and appraised at the sum of ninety thousand dollars, and should she be retained so long in the service of the United States that the money paid and due on account of said charter (deducting therefrom the actual cost of running and keeping in repair the said vessel during the said time, together with a net profit of thirty-three per cent. per annum on said appraised value) shall be equal to said appraised value, then the said vessel shall become the property of the United States without further payment, except such sum as may then be due on account of the services of the said vessel, rendered under the said charter.

And further, if at any time during the continuance of this charter the United States shall elect to purchase the said vessel, then they shall have the right to take her at the appraised value at the date of charter, and all money then already paid and due on account of said charter (deducting therefrom the actual cost of running and keeping in repair the said vessel during the said time, together with a net profit of thirty-three per cent. per annum on the original appraised value) shall apply on account of the said purchase.

This charter shall go into effect at twelve o'clock m. of the 14th day of September, 1863, and shall continue in force as long as said vessel may be required by the United States War Department.

No member of Congress shall be admitted to any share or part of this contract, or any benefit to arise therefrom.

In witness whereof the said parties to these presents have hereunto interchangeably set their hands and affixed their seals, on the 14th day of September, 1863.

(Executed in quintuplicate.)

SAM'L L. MITCHILL. [L. S.]
STEWART VAN VLEIT, [L. S.]
Assistant Q. M.

Signed, sealed, and delivered in the presence of—
W. C. DAVIS.
O. SCHENCK.

The services of the above vessel being required for a second voyage to New Orleans, she is kept in continuous service from the date of the discharge of her cargo on the 13th October, 1863.

D. STIMSON,
Assistant Q. M.

U. S. QUARTERMASTER'S OFFICE,
New York, December 4, 1863.

The within charter-party suspended on the 22d day of November, 1863, at 12 o'clock noon, and resumed on the 30th day of November, 1863, at 12 o'clock noon, to be continued for as long a period as the vessel's services may be required, at the rate of compensation therein expressed.

D. STIMSON,
Assistant Q. M.

5 In the United States Court of Claims, December term, A. D. 1868.

SAMUEL L. MITCHELL
vs.
THE UNITED STATES. } No. 4665. Filed May 25, 1869.

And the said defendants, by their Attorney-General, come and make answer to the petition of the claimant herein; and, not confessing the same, or any part thereof, deny each and every the allegations therein contained, and call for strict proof of the same.

And as to so much of the said petition as sets forth and avers that the said United States are indebted to the said claimant in the sum of $3,600, the said defendants say that they are not indebted to the said claimant in the said sum of money, nor any part thereof.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the said defendants deny the said allegation.

T. LYLE DICKEY,
Assistant Attorney-General.

6 United States Court of Claims.

SAMUEL L. MITCHELL
vs.
THE UNITED STATES. } No. 4665.

Plaintiff's counsel prays for the following order:

The death of the petitioner having been suggested, and the appointment of Ann E. Mitchell as executrix, and Bleecker W. Mitchell, Edwin C. Sturges, and Spofford H. Davis as his testamentary executors, and duly-authenticated copies of the letters being produced, it is now ordered that the same be filed and that the said parties be now allowed to appear as petitioners and carry on the above suit.

THOMAS J. DURANT,
Of Counsel.

Filed February 23, 1874.

7 In the United States Court of Claims.

SAMUEL L. MITCHELL
vs.
THE UNITED STATES. } No. 4665.

FEBRUARY, 23, 1874.

M'r Durant filed letters testamentary and motion suggesting the death of the claimant, and asking that the suit be revived in the names of Ann E. Mitchell, executrix, and Bleecker W. Mitchell, Edwin C. Sturges, and Spofford H. Davis, executors.

Allowed.

By the Court.

A true copy of record.

8 In the Court of Claims.

SAMUEL L. MITCHELL
vs.
THE UNITED STATES. } 4665.

At a Court of Claims held at the Capitol, in the city of Washington, the 8th day of February, A. D. 1875, judgment was ordered to be entered up as follows:

The court, upon due consideration of the premises, find in favor of the defendants, and do order, adjudge, and decree that the said claimant's petition be dismissed.

By the court.

A true copy of record.

9 In the honorable the United States Court of Claims.

SAMUEL L. MITCHELL
vs.
THE UNITED STATES. } No. 4665.

The petition of claimant respectfully represents there is, as he is advised, error in the judgment rendered against him in this case, and he prays to be allowed to appeal therefrom.

THOMAS J. DURANT,
For Claimant.

Filed February 16, 1875.

Ordered, that the appeal be allowed as prayed for.

By the court.

FEBRUARY 16, 1875.

10 SAMUEL L. MITCHELL
vs.
THE UNITED STATES. } 4665.

In this case, upon the evidence, the court finds the facts to be as follows:

The charter-party annexed to the petition as Exhibit A was executed as alleged.

The steamer Star of the South made the voyage stipulated for in said charter-party, from New York to New Orleans and return; and on her return to New York her cargo was discharged on the 13th of October, 1863.

After the completion of said voyage, Captain D. Stimson, assistant quartermaster at New York, endorsed upon said charter-party the following order:

"The services of the above vessel being required for a second
11 voyage to New Orleans, she is kept in continuous service from the date of the discharge of her cargo, on the 13th October, 1863."

In pursuance of this order, said vessel made a second voyage from New York to New Orleans and back, completing it by unloading her cargo at New York on the 22nd of November, 1863, on which day the said charter-party was, by order of said Stimson, suspended, and continued so suspended until the 30th of November, 1863. During the period of such suspension the said steamer performed no service for the Government, but was manned and equipped and ready for such service.

On the said 30th of November she was taken into the service of the Government again, under another charter-party.

For the two voyages from New York to New Orleans and back, as above stated, the claimant was paid the price stipulated in said first-
12 named charter-party up to November 22, 1863; and he was also paid the stipulated price for the services of said steamer from November 30 to December 30, 1863.

Upon the foregoing facts, taken in connection with those found upon

the claimant's request, the court are equally divided upon the question of the right of the claimant to recover compensation for the time between the 22nd and the 30th days of November, 1863; and one of the judges who holds him entitled to recover concurs with those who hold adversely in ordering that, pro forma, for the purposes of an appeal, the petition of the claimant be dismissed.

By the court.

The court delivered no opinion in this case.

13 In the United States Court of Claims.

SAMUEL L. MITCHELL
vs.
UNITED STATES. } No. 4665.

And now comes petitioner, by his counsel, Thomas J. Durant, and respectfully prays:

First. That the court may be pleased to modify the statement of facts filed on 23rd January, 1875, in the following particulars, viz:

A. By striking out from the paragraph commencing with the words "in pursuance of this order," and ending with the words "ready for such service," "completing it by" and substituting the word "and."

Because the words "completing it by," means that the vessel completed her voyage by unloading at New York, which is not the statement of a fact, but is a matter of law putting an interpretation
14 on the contract of charter-party.

The contract binds the U. S. to pay for every day $450 "until the said vessel is returned to the said party of the first part in New York."

B. And further, by striking out in the same paragraph after the words "During the period of such suspension the said steamer," the words "performed no service for the Government; but," and the word "such" before the final word "service," so that this part of the paragraph may read, "During the period of such suspension, the steamer was manned and equipped and ready for service."

The statement that she performed no service, is an interpretation of the act of Stimson, which he calls "suspending the charter-party," (see memorandum at the foot of charter-party,) for unless that act put her out of the service of the Government, she still remained in, and
15 whether she was in or out by that act is a question of law, and if in, though lying moored to the wharf, she was performing service for the Government.

And the petitioner further prays that the court may be pleased to find the following additional facts:

First. The suspension of the charter-party was not considered by Stimson, who made the order suspending it, as equivalent to a discharge of the steamer. (See testimony of Stimson, Record, page 26, line 16, where he says "she could have had her discharge as well as her suspension;" he uses the two terms in contradistinction to one another.)

Second. Stimson had no power to discharge the steamer. (See testimony of Stimson, Rec., page 26, lines 16 and 17.)

16 Third. The control of suspended vessels was not within the power of the United States quartermaster's office at New York, of which office Stimson formed a part. (Stimson's testimony, Rec., p. 26, lines 18, 19.)

Fourth. A discharge of the vessel could have been procured by telegraphing to Washington for it. (See Stimson's testimony, Rec., p. 26, lines 17 and 18.)

All of which is respectfully submitted.

January 28, 1875.

THOMAS J. DURANT,
Of Counsel.

Upon the foregoing requests for additional findings, the court makes the following rulings, to wit:

So much of the foregoing motion as prays modifications of the finding of facts made by the court is disallowed, because not authorized by the rules of the Supreme Court and of this court.

The first and fourth requests for the finding of specific facts are refused, and the second and third are allowed.

By the court.

17 In the Court of Claims.

SAMUEL L. MITCHELL *vs.* THE UNITED STATES. } No. 4665.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, and the final judgment of the court thereon; of the application of the solicitors for the claimant for the allowance of an appeal, as filed in the clerk's office February 16, 1875, and of the order of the Court of Claims allowing the same; of the findings of fact and the pro forma order of the court thereon; and of the request for additional findings by the claimant and the order of the court thereon.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington, this fourth day of October, 1875.

[SEAL.]

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

(Indorsement on cover:) No. 207. Ann E. Mitchell, executrix, and Bleecker W. Mitchell, Edwin C. Sturges, and Spofford H. Davis, testamentary executors of Samuel L. Mitchell, dec'd, appellants, vs. The United States. Court of Claims. Filed 13th October, 1875.

In the Supreme Court of the United States.

OCTOBER TERM, 1877.

SAMUEL L. MITCHELL'S EXECUTORS, *Appellants,*
vs.
THE UNITED STATES.
No. 207.

On appeal from the Court of Claims.

BRIEF FOR PLAINTIFF AND APPELLANT.

This appeal is taken from a judgment dismissing plaintiff's petition by a divided court without the expression of any opinion.

The pleadings and findings of fact present succinctly the questions involved, and the manner in which they are raised. Pleadings, Rec. pp. 1 to 4. Facts, Rec. pp. 5, 6, 7.

The United States chartered of Mitchell, the Steamer Star of the South, at the rate *inter alia*, of "the full and just sum of $450 per day for each and every day said vessel may be employed, and will furnish all fuel necessary for the navigation of the said vessel, if a steamer, until the said vessel is returned to the said party of the first part in New York, in the same order as when received," &c. &c.

Under this clause, the claimant prays judgment for seventy-seven days, at $450 per day, amounting to	$34,650 00
Less amount received on account	31,050 00
Leaving amount still due	$3,600 00

This balance of $3,600 is composed of eight days' services at $450 per day, which is the matter in dispute between the parties.

The charter-party is on Record, pp. 2 and 3. It is believed to be identical with that which was reviewed by this court, in the case of Propeller Co. *vs.* U. S., 14 Wall., 674.

The contest grows out of the effect to be given to two endorsements made on the charter-party by Charles D. Stimson, assistant quartermaster at New York.

The first, under date of October 13, 1863, after the steamer had made the *first* voyage stipulated for in the charter-party from New York to New Orleans and return, reads as follows: "The services of the above vessel being required for a *second* voyage to New Orleans, she is kept in continuous service from the date of the discharge of her cargo, on the 13th of October, 1863." The second endorsement, after the steamer's return from her *second* voyage, is as follows:

"U. S. QUARTERMASTER OFFICE,
NEW YORK, *December* 4, 1863.

The within charter-party *suspended* on the 22d day of November, 1863, at 12 o'clock noon, and *resumed* on the 30th day of November, 1863, at 12 o'clock noon, *to be continued* for as long a period as the vessel's services may be required, at the rate of compensation therein expressed.

D. STIMSON,
Assistant Quartermaster."

The findings of the Court of Claims set forth only the first order in the very terms in which it is endorsed on the charter-party. The finding which involves the second order reads as follows:

"In pursuance of this order (that is, the first endorsement made by Stimson upon the charter-party), said vessel made a second voyage from New York to New Orleans and back, completing it by unloading her cargo at New York on the 22d of November, 1863, on which day the

said charter-party was, by order of said Stimson, *suspended*, and *continued so suspended until the 30th of November*, 1863. During the period of such *suspension* the said steamer performed no service for the Government, but was manned and equipped, and ready for such service."

A request was made for a restriction of this finding to matters of fact, and so as to avoid the solution of law questions; but the court was of opinion, it was without authority, under the rules of this court and of the Court of Claims, to make the desired modification.

But the court allowed two findings of specific facts as requested by plaintiff's counsel, viz: "That Stimson had no power to discharge the steamer" and "the control of suspended vessels was not within the power of the United States quarter master's office at New York, of which office Stimson formed a part."

Assignment of Errors.

First. The court below erred in dismissing the petition and in not awarding petitioner the sum of thirty-six hundred dollars.

Second. And in sustaining a defence interposed by the United States without the legal proofs necessary to support it.

Argument.

Two questions are presented for solution:

First. Under the charter party did any sum of money fall due from the United States to the appellant Mitchell, for the eight days' alleged services, the steamer not performing any service for the Government, but was manned, equipped and ready for such service?

Second. Have the United States been in any way relieved from the obligation to pay for the eight days, during which it is found that the charter-party was *suspended?*

The obligation to pay set forth in the contract is "for

each and every day said vessel may be employed." But neither the language nor the intent of the parties can be satisfied if the succeeding clause be omitted, viz: "until the said vessel is returned to the said party of the first part in New York" &c. Now it is not pretended that the vessel ever was returned to the owner, until 30th of December, 1863. The interjected hypothetical clause "and will furnish all fuel necessary for the navigation of the said vessel, if a steamer," &c., is not only a manifest addition to the old ordinary form of the printed charter-parties in the quartermaster's office, but has no intellectual connection whatever with the clause following it. Furnishing fuel to this steamer "necessary to her navigation" *after* the charter-party had expired or been cancelled, is manifestly irrelevant. The vast increase in the number of steam vessels employed by the Government in carrying on the war, was doubtless the cause for the insertion of this condition.

Nor does the alleged non-performance of any services for the Government seem to us a fair reason for denying the falling due of $450, from day to day. The charter-party was not in fact a contract by the day, but on a conditional event, that is, the delivery of the steamer to the owner in New York. Until this event happened, the contract was in operation and the employment continued. The fact that the steamer was kept ready to respond to any demand for her services under the charter-party, with captain, officers and crew all on board and under pay, is conclusive on this point so far as petitioners are concerned. Besides, the adverse construction would operate so as to exclude all time not occupied in the actual navigation of the vessel; lying at the wharf all prepared, may be as much and as effectually in the employment of the Government, as taking in or landing cargo, raising steam, or as being in actual transit from place to place. A steamer engaged in carrying freight is no more expected

to be at the same time both at sea and in port, than the soldier to be always fighting. It is, besides, very clear in this case, the United States furnishing the fuel, that the actual expenses of the boat, day by day, were in no respect different whether the vessel was lying in port or ploughing the sea.

But it is thought the action of the assistant quartermaster, Stimson, relieved the United States from all liability for these eight days here in dispute; and it is alleged the Department refused the compensation applied for, on this ground.

We would much prefer, whilst regarding with the eye of reason and law, the conduct of the officers of the United States, not to find "any device unfairly to evade the performance of the claimant's contract," or even to surmise the existence of any such device; and we cheerfully and fully admit and recognize the truth that the judiciary "should at all times be slow to sustain such an imputation upon the good faith of the Government."

Shrewsbury *vs.* United States, 18 Wall., 668.

We, therefore, at once admit that if any such device, or fact, or inference from fact can be drawn from the findings or the *pro forma* judgment of the lower court, your honors should disregard this view of the case if possible. The hypothesis, "that any officer of the Government may at any time, suspend the operation of a contract and thereby cancel and annul it in its operation upon the parties," is refuted in its utterance. The Secretary of War, backed by an act of Congress, cannot do it. True, *he* may suspend; but the very power *he* is authorized to employ in suspending, is coupled with the legal and moral obligation on *his* part of compensation. The power and obligation are inseparable.

U. S. *vs.* Corliss Steam Co., 1 Otto, 321.

We do not believe that Stimson, the quartermaster, by his endorsement on the charter-party, either destroyed or

intended to destroy the correlative rights and duties of the parties thereto.

In the *first* place, he makes use of no such language. He "suspends"—he does not destroy—the continuous service of the boat in Government employ.

Secondly. The whole contract of charter-parter must be regarded; and then it is perceived that the United States had, at the date of the suspension by the assistant quartermaster, say on November 22, 1863, a proprietary interest—a beneficial ownership—an equitable or insurable interest in the steamer Star of the South to the extent of "the money paid and due on account of said charter (deducting therefrom, &c., &c.)" * * * This amount of moneyed interest without deduction was then $31,050, or for 69 days at $450 *per diem* from September 14, 1863, to November 22, 1863. If the suspension did, in fact, destroy the contract, then the assistant quartermaster gave up this valuable interest belonging to the United States. This seems to us the exact reverse of what was really intended. Nothing hindered the officer from returning the vessel to the owners and putting an end to the charter-party, had it been so desired; on the contrary, he suspends the contract; that is, he has nothing for her to do at the moment, but he retains the right either to send her again to sea, or to take her in full ownership on the terms agreed upon.

Thirdly. Even if the United States were under no obligation by the terms of the charter-party; if the contract commits the Government to nothing but to pay for services rendered, still, if the owner was subjected to the loss of time, to trouble and expense, the United States would be bound to indemnify. This is the principle of necessary implication on which human affairs are largely conducted.

See Bulkey *vs.* United States, 19 Wall., 37, 40.

Fourthly. It is still more clear that on November 23, 1863, the owner of the steamer, even had he been notified

of the suspension of the charter, had no legal right to enter into any new business; he was bound to wait for the delivery of the steamer to him in New York; he could not go at once into another employment, nor could he destroy the vested right of the United States in his steamer, on the ground that the assistant quartermaster had *suspended* the charter-party.

Fifthly. But the charter-party is commutative and its obligations reciprocal. It could not be novated by one party without the consent of the other. When the agreement between both parties became binding for a new charter-party, then and then only would the original charter-party be extinguished. But this view is inconsistent with Stimson's last endorsement. He speaks of suspension and resumption of the original contract, and at the same compensation. It seems to us plain that the interest of the Government continued until December 30, 1863, without interruption from the date of the contract; and had the steamer been lost on any day in this term by a war risk, the proper settlement would be to deduct the pay for the eight days here claimed for, on the principles enunciated in Propeller Company *vs.* United States, 14 Wall., 670, as well as the $31,050 already paid to the owner. The opposite contention, by novating the charter —the finding is "*On the said 30th November she was taken into the service of the Government again, under* ANOTHER *charter-party*"—would destroy this valuable right of the United States under the original contract.

Sixthly. It nowhere appears in this record that this suspension by Stimpson was ever *notified* to the owner or his agents. The fact of suspension is found by the court, as well as its continuation until the 30th of November. The entry upon the charter-party is dated December 4, 1863. If the owner was not notified, it seems impossible to avoid the conclusion that the United States are still liable for the daily pay of the steamer. (See Terry *vs.* United States,

9 Ct. Claims, 233.) And the fact of notification, being an essential part of the defence, should have been among the findings of the court, and cannot be legally or properly inferred from the facts found.

We pray for a reversal and a judgment in our favor for the amount claimed, with general relief.

DURANT & HORNOR,

Attorneys for Appellants.

WASHINGTON, D. C., *November* 16, 1877.

[redacted]

OCTOBER TERM, 1917.

SAMUEL L. MITCHELL, ADMINISTRATOR,
v.
THE UNITED STATES.

No. 297.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

9 Ct. Claims, 233.) And the fact of notification, being an essential part of the defence, should have been among the findings of the court, and cannot be legally or properly inferred from the facts found.

We pray for a reversal and a judgment in our favor for the amount claimed, with general relief.

DURANT & HORNOR,
Attorneys for Appellants.

WASHINGTON, D. C., *November* 16, 1877.

In the Supreme Court of the United States.

OCTOBER TERM, 1877.

SAMUEL L. MITCHELL'S EXECUTORS
v.
THE UNITED STATES.
} No. 207.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1877.

SAMUEL L. MITCHELL'S EXECUTORS
v.
THE UNITED STATES. } No. 207.

APPEAL FROM THE COURT OF CLAIMS.

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STATEMENT.

The late Samuel L. Mitchell, the original petitioner, upon the 14th day of September, 1863, at New York City, chartered his steamer Star of the South "for a voyage to New Orleans and return," *and not for any definite term*, for $450 a day. That voyage was completed. The charter contained a clause that it was "to continue in force as long as said vessel may be required by the United States War Department." Probably claiming to exercise the privilege thus conferred, an assistant quartermaster wrote upon the charter-party, at the close of the voyage first stipulated for, these words: "The services of the above vessel being required *for a second voyage to New Orleans*, she is kept in continuous service from the date of the discharge of her cargo, on the 13th October, 1868.—D. Stimson, assistant quartermaster." (Record, 2, 3.) The cargo brought back to New York

on this second voyage was fully discharged at New York November 22, 1863. "*Upon that day*," so the Court of Claims find as a fact (which, therefore, cannot be controverted here), *the said charter was*, by order of said Stimson, *suspended, and continued so suspended until the 30th of November*, 1863. During the period of such suspension the said steamer performed no service for the government, but was manned and equipped ready for such service. On the said 30th November she was *taken into the service* of the government *again, under another charter-party*." (Record, 5, folio 11.) Under all these charters, the last of which terminated December 30, 1863, the owner has been paid the stipulated price in full, unless he is entitled to pay for the eight days between November 22 and November 30, 1863, between the discharge of the cargo brought upon the second return voyage and her third engagement. (*Ib.*) By reference to the duplicate of the charter in the claimant's possession, and by him annexed to his petition, it will be seen to bear this indorsement:

"UNITED STATES QUARTERMASTER'S OFFICE,
"*New York, December* 4, 1863.

"The within charter-party suspended on the 22d day of November, 1863, at 12 o'clock noon, and resumed on the 30th day of November, 1863, at 12 o'clock noon, to be continued for as long a period as the vessel's services may be required, at the rate of compensation therein expressed.

"D. STIMSON,
"*Assistant Quartermaster*."

(Record, 3, bottom.)

The right to $450 a day during this eight days' suspension, $3,600, is the whole controversy in this case.

BRIEF.

I.

It does not appear that either Major Van Vleit, quartermaster, or Captain Stimson, assistant quartermaster, had any authority to charter the Star of the South at all. The act of March 2, 1861, c. 84, § 10, required "that all purchases and contracts for supplies or services, in any of the departments of the government, except for personal services, when the public exigencies do not require the immediate delivery of the article or articles, or performance of the service, shall be made by advertising a sufficient time previously for proposals respecting the same. When immediate delivery or performance is required by the public exigency, the articles or service required may be procured by open purchase or contract at the places and in the manner in which such articles are usually bought and sold or such services engaged between individuals. No contract or purchase shall hereafter be made, unless the same be authorized by law or be under an appropriation adequate to its fulfillment, except in the War and Navy Departments, for clothing, subsistence, forage, fuel, quarters, or transportation, which, however, shall not exceed the necessities of the current year. And the third section of the act entitled 'An act making appropriations for the legislative, executive, and judicial expenses of the government for the year ending the thirtieth of June, eighteen hundred and sixty-one,' shall be, and the same is hereby repealed." (12 Stats., 220, bottom.)

The act of June 2, 1862, c. 93, § 1, required all con-

tracts made by the War Department, "on behalf of the government, or by their officers under them appointed to make such contracts, to be reduced to writing, and signed by the contracting parties with their names at the end thereof," &c. (*Id.*, 411, bottom.)

Previous advertisement was essential to the validity of a contract for services in affording transportation, unless some public exigency required this to be dispensed with. A local quartermaster, or his assistant, had no authority to determine and declare for himself the existence of such an emergency. If any such was declared to exist in the present instance, it was a fact to be proved in support of the claimant's case. The Court of Claims inferred it as a legal conclusion, from the maxim *omnia præsumuntur rite*, &c. That such was the means of establishing the existence of this necessary link in the chain of evidence is apparent from the fact it is not stated as directly proved, and from the opinion of Nott, J., concurred in by Milligan, J., in the case of Thompson *v.* United States (9 Ct. of Cls., 187), Drake, C. J., ably and strongly dissenting, and the other two judges not sitting. The effect of this decision (as the chief justice observes) was to overrule McKinney's case (4 Ct. of Cls., 537). In his opinion Mr. Justice Nott refers to Speed's case (8 Wall., 77) as supporting his view. A reference to the statement of the facts of that case, however, as given in 2 Ct. of Cl., 433, shows that the contract with Speed was made by order of the Commissary-General, with the express approbation of the Secretary of War. That the court did rely upon the aforesaid presumption as supplying necessary proof is apparent by referring to Ross's case. (10 Ct. of Cl. R., 424.) Reversing the judgment in the last-mentioned case,

this court said that presumption "does not supply proof of a substantive fact." (United States *v.* Ross, 92 U. S., 284, bottom.)

For all the benefit derived from this steamer's services the United States have fully paid. The effort being to obtain $450 a day for time when she rendered no service, we may well question the authority to make the contract out of whiah it is contended this obligation arises.

II.

The charter-party recited in the record (pp. 2, 3) is the document by which this claim must stand or fall. In its original state, the only *specific* term of engagement mentioned was the trip to New Orleans and back, though there was provision made for its continuance during the pleasure of the War Department. If the first indorsement is a signification that the War Department pleased to require the further service of the vessel, it also expresses that it is only so required "for a second voyage to New Orleans." Without proof of further action, the charter of the Star of the South expired with the termination of this second voyage and the discharge of the cargo then brought. Not another hour's service was ever, in fact, rendered under *that* charter, but on the last day of November, 1863, she was *taken into the service* of the government *again* "under *another* charter-party." (Record, 5, folio 11, bottom.

She was left in the hands of her master and owners at the port of restoration, as stipulated in the contract (Record, 2, bottom), which thereupon expired by its own limitation.

The charter only bound the charterers "to employ the said vessel *on the voyage or voyages* aforesaid" (Record, 2, bottom), and to pay therefor "the full and just sum of $450 per day for each and *every day said vessel may be employed.*" (*Ib.*) That is to say, the completion of her voyage (or voyages, to and from New Orleans) terminates her employment; and only for the days which precede that event (that on which it occurs) is she entitled to her per diem. Therefore the first indorsement was made to show the facts of a renewed or continued engagement. There can be no implied promise of compensation, when all the terms of agreement are expressed; nor where there was no equivalent rendered, of services or otherwise; and where no expenses were incurred at the request of, or beneficial to, the party sought to be charged by implication. If our view is correct, the passage (on page 7 of appellant's brief) about loss of the vessel by a war-risk during the eight days she lay idle at the pier in New York Harbor is, to express it mildly, inapplicable.

III.

If Stimson had no power to discharge the vessel, and the control of suspended vessels was not lodged with the office at which he was employed, then he had no right to start her upon her second voyage.

A perfect answer to all this is, however, as we believe, that the *acquiescence* of the other party at the time precludes the taking of a different position now. The suspension is indorsed on and as part of the copy of the charter produced by the petitioners. That is evidence not only of notice but of assent. The statement (near the bottom

of page 7 of counsel's brief) that "if the owner was not notified, it seems impossible to avoid the conclusion that the United States are *still* liable for the daily pay of the steamer," is met by the above suggestion.

What were the terms of the charter in the Ferry case, cited, do not appear; except the opinion says the Ocean Wave was ordered to New York, there to report to the quartermaster, which was done daily. Here, the promise was to pay for the services of the Star of the South while employed, and for those only.

The right of the United States to elect to purchase terminated with the charter.

The charter was for specific voyages, and then expired unless notice was given of a further requisition for service. It did not need notice to terminate the engagement, but to continue it.

EDWIN B. SMITH,
Assistant Attorney-General.